lack of understanding and experience in chambers matters. The usual practice in a case of such nature is to allow an adjournment for substituted service as at least two attempts at personal service have not been successful. The learned Judicial Commissioner could neither grant nor dismiss the application as the summons was not served. To refuse the application when the summons was not even served would mean making a judicial decision before a party is heard. This is contrary to the rules of natural justice and cannot be supported.

Accordingly, we allowed the appeal and set aside the order made by the learned Judicial Commissioner with liberty to appellant to apply further against the sixth partner, if necessary. We made no order as to costs. Deposit to be refunded to appellant.

Appeal allowed.

Solicitors: *Chong Brothers.*

NG YIT SENG & ANOR. v. SYARIKAT JIWA MENTAKAB SDN. BHD. & ORS.

[F.C. (Raja Azlan Shah C.J. (Malaya), Abdul Hamid F.J. & Abdoolcader J.) May 20 & June 5, 1981]

[Kuala Lumpur — Federal Court Civil Appeal No. 42 of 1980]

Practice and Procedure — Appeal — Appeal record not served on respondents — Application to dismiss the appeal — Federal Court (Civil Appeal) (Transitional) Rules 1963, r. 19(8) — Rules of the Federal Court 1980, rr. 62(9), 163 & 164.

In this case the appellants' claim for specific performance of a contract involving the right to work a timber concession and damages had been dismissed in the High Court. The appellants filed notice of appeal and eventually filed the record of appeal. No copy of the record was however served on the respondents or their solicitors. The respondents took out a motion to dismiss the appeal as the record of appeal had not been served on them or their solicitors.

Held: in this case the appellants had failed to comply with the statutory provision requiring service of the copy of the record of appeal on the respondents or their solicitors and therefore the appeal must be dismissed.

Cases referred to:-

(1) *Pow Hing & Anor.* v. *Registrar of Titles Malacca* [1981] 1 M.L.J. 155, 157.

(2) *Scurr & Ors.* v. *Brisbane City Council & Anor.* (1973) 47 A.L.J.R. 532, 536.

(3) *Cullimore* v. *Lyme Regis Corporation* [1962] 1 Q.B. 718.

(4) *Coney* v. *Choyce* [1975] 1 W.L.R. 422, 434.

(5) *Regina* v. *Croydon Justices, ex parte Lefore Holdings Ltd.* [1981] 1 All E.R. 520; [1980] 1 W.L.R. 1465.

FEDERAL COURT CIVIL APPEAL.

J.G. Bernatt for the appellants.

C.C. Aiyathurai for the respondents.

Cur. Adv. Vult.

Abdoolcader J. (delivering the judgment of the Court): The appellants' claim as plaintiffs in the substantive proceedings for specific performance by the 1st respondent of a contract involving the right to work a timber concession in Pahang and for damages against all the respondents jointly and severally was dismissed by Syed Othman F.J. (sitting as a judge of the High Court) on January 26, 1980. A notice of appeal against that decision was filed on February 25, 1980 and served on the respondents, solicitors on the same day. The appeal was entered accordingly by the federal registry and given its designated number and the record of appeal was required to be filed on or before April 7, 1980. A draft index for the record was served on the respondents' solicitors on April 2, 1980 and the record itself was filed in the registry on April 5, 1980 but apparently no copy thereof was served on the respondents or their solicitors as they allege as required by the provisions of rule 19(8) of the Federal Court (Civil Appeals) (Transitional) Rules, 1963 which provide that the appellant shall at the time of filing the record serve a copy thereof on each party who has been served with the notice of appeal. The equivalent provision now operative is rule 62(9) of the Rules of the Federal Court, 1980 ('the 1980 Rules') which came into force on June 1, 1980. The appeal was set down for hearing at the sitting of this Court commencing May 19, 1981 but on May 4, 1981 the respondents took out a motion to dismiss the appeal as the record of appeal had not been served on them or their solicitors in compliance with the rules even up to the date when the motion was filed.

The affidavit in support of the motion to dismiss the appeal disclosed that the appeal had in fact first been fixed for hearing on January 12, 1981 but was taken out of the list for that sitting at the request of the appellants' solicitors. On March 4, 1981 the respondents' solicitors wrote to the appellants' solicitors stating that they had not been served with the record of appeal in compliance with the requisite provision of the relevant rules and requesting that either the record be sent to them as soon as possible under A.R. registered cover or that an appointment be given for them to collect the record at the appellants' solicitors' office. The response to this was a carbon copy to them of a letter dated March 9, 1981 from the appellants' solicitors to the 1st appellant enclosing a copy of the respondents' solicitors' letter of March 4, referring to the fact that the 2nd appellant was to have served a copy of the record on the respondents' solicitors and that the appellants' solicitors had been informed by the 1st appellant that this had been done and asking for 'fresh instructions or else it might be too late', whatever that means.

It then appears that the 1st appellant in an affidavit made in connection with a summons in chambers in the High Court action which was wholly unrelated to the question of service of the record of appeal affirmed that he did himself serve the record on the respondents' solicitors on April 7, 1980. The respondents' solicitors took cognizance of this averment notwithstanding the fact that it was made in a wholly unrelated context and process and wrote to the appellants' solicitors on March 29, 1981 referring thereto and stating that all documents received by them by way of service would always have their acknowledgment with the stamp of the firm, the date of service and the signature of the person in the firm accepting service and requesting proof of service of the record of appeal within 14 days. There was no response whatsoever to the eminently reasonable request made in this letter.

On May 14, 1981, just 5 days before the respon-

dents' motion and the appeal were due to be heard, the 1st appellant made an affidavit stating that he did serve the record of appeal on the respondents' solicitors. If indeed he did so, he should and could have made an affidavit of service under the provisions of rule 73 of the 1980 Rules which *mutatis mutandis* apply the provisions of Order 62 rule 9 of the Rules of the High Court, 1980 requiring particulars to be stated therein of who effected service and on whom, the day of the week and date on which it was served, where it was served and how in form (a) of Form 137 thereof. Not only has this not been done but the 1st appellant in his affidavit of May 14 did not and could not specify the person on whom he alleges he effected service and even the date and place this was done, and could not furthermore say if he had in fact taken any acknowledgment but said that if there was one, he thought he had mislaid it. In the face of all this we certainly could not accept the allegation of service of the record on the respondents' solicitors by the 1st appellant and all the more so as the appellants' solicitors in their letter of March 9, 1981 clearly referred to the fact that the service had supposedly been effected by the 1st appellants' brother, the 2nd appellant, and not by the 1st appellant although the 1st appellant in his affidavit of May 14 affirmed that he had told his solicitors that he himself had effected service a few days after doing so.

It is clear therefore that there was no effective response whatsoever to the complaint by the respondents' solicitors that the record of appeal had not been served on them until after the motion to dismiss the appeal had been filed although the respondents' solicitors had by their letter of March 4, 1981 offered to accept the record well out of time almost a year after it should have been served and they even went so far as to offer to collect the record by appointment at the appellants' solicitors' office. It was only on May 16, 1981, some 3 days before the respondents' motion and the appeal were due to be heard, that a copy of the record of appeal was served on the respondents' solicitors, and the 1st appellant in his affidavit of May 14, in language appropriate to a pugilistic contest, said that he would be serving 'another copy' of the record on the respondents' solicitors as he '(did) not wish to be prejudiced in any way in (his) attempt to get justice by any technical knock-out'.

We have in our judgment in *Pow Hing & Anor.* v. *Registrar of Titles, Malacca*[1] (at page 157) set out an exposition of the mandatory-directory dichotomy in relation to statutory requirements and it is only necessary to add in the context of the matter before us that even in relation to directory provisions substantial compliance is still necessary and that the failure to observe directory requirements may also lead to invalidity. The High Court of Australia so held in *Scurr & Ors.* v. *Brisbane City Council & Anor.*[2] and Stephen J., said (at page 536): "It is well-established that a directory interpretation of a statutory requirement still necessitates, as a condition of validity, that there should be substantial compliance with the requirement", citing in support *Cullimore* v. *Lyme Regis Corporation*[3] as providing a modern instance of this. In *Coney* v. *Choyce*[4] Templeman J., held (at page 434) that the regulations under consideration in that case must be treated as directory as both the object and the terms of the regulations themselves seemed to him to support that, and the consequences of the contrary also seemed to him to require it but he went on to say he accepted there must be substantial compliance with the regulations. Lawton L.J., in his judgment in the recent English Court of Appeal decision in *Regina* v. *Croydon Justices, ex parte Lefore Holdings Ltd.*[5] approved and applied this principle, adopting Templeman J.'s phrase in *Coney* v. *Choyce*[4] as to a 'substantial compliance with the regulations'.

Apropos of the matter before us, there has been no compliance at all with the relevant statutory provision requiring service of a copy of the record of appeal on the respondents or their solicitors, let alone substantial compliance — and this notwithstanding the respondents' solicitors' offer to accept service well out of time and even to the extent of offering to collect the record themselves. The request for proof of alleged service by the 1st appellant was totally ignored and only when faced with the respondents' motion was the position sought to be rectified and then only some 3 days prior to the date fixed for hearing of the motion and the appeal. There could therefore in the circumstances be no question of reliance, as Mr. Bernatt for the appellants sought to urge us, on the provisions of rule 163 of the 1980 Rules that non-compliance with any of these rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the court or a judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the court or judge shall think fit. The conduct of the appellants in the matter complained of has been wholly inexcusable and nothing short of a blatant and callous disregard for the rules, and it is time that litigants and their legal advisers realise and appreciate that rules are made to be observed and complied with and not flouted or wantonly ignored ad libitum.

Mr. Bernatt also sought to rely on rule 164 of the 1980 Rules which provides that no application to set aside any proceedings for irregularity shall be allowed unless made within a reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity. We cannot see how this rule has any application whatsoever to the matter before us as the respondents have certainly taken no fresh step of any sort after knowledge of the irregularity which would preclude their application to dismiss the appeal and they have not in any way been dilatory either in doing so as they voluntarily on their part made the necessary overtures by their solicitors' letter of March 4, 1981 in giving the appellants and their solicitors an opportunity to rectify and regularise the position but with no response and then again when their request in their letter of March 29, 1981 for proof of the alleged service of the record on them was wholly ignored and left unanswered, and in the circumstances after allowing a decent interval to elapse in the expectation, unrealised however, of some response thereto in view of the categorical assertion by the 1st appellant on affirmation that he had indeed effected service, they had no alternative but to file this motion to dismiss the appeal.

In the premises and for the reasons we have given we allowed the respondents' motion and dismissed this appeal with costs and directed that the deposit lodged in court by way of security be paid out to the respondents to account of their taxed costs.

Appeal dismissed.

Solicitors: *Baharuddin, Bernatt, Tan & Ker; C.C. Aiyathurai & Co.*

FADZIL BIN MOHAMED NOOR v. UNIVERSITI TEKNOLOGI MALAYSIA

[F.C. (Raja Azlan Shah C.J. (Malaya), Abdul Hamid F.J. & Abdoolcader J.) May 22 & June 16, 1981]

[Kuala Lumpur — Federal Court Civil Appeal No. 128 of 1980]

Administrative Law — Application for declaration — Purported dismissal by University Council ultra vires, illegal and void — Disciplinary proceedings — To be exercised by Disciplinary Committee — University Council has no power to exercise disciplinary powers — Purported dismissal of lecturer void — Constitution of Universiti Teknologi Malaysia, ss. 4(1) & 16 — University and University Colleges Act, 1971, ss. 7, 16A & 16C.

Labour Law — Dismissal of assistant lecturer in University — Status supported by statute — Entitlement to protection of hearing before appropriate disciplinary committee — Purported dismissal by University Council void — Constitution of Universiti Teknologi Malaysia, ss. 4(1) & 16 — University and University Colleges Act, 1971, ss. 7, 16A & 16C.

Practice and Procedure — Summary judgment — Action for declaration to declare purported dismissal of University lecturer ultra vires, illegal and void — Construction of documents — Interpretation of statutory provisions — Application for summary judgment granted — R.H.C. 1980, O. 14.

In this case the appellant who was an Assistant Lecturer in the Universiti Teknologi Malaysia applied for leave to contest the elections in the General Election. He was granted leave but finding the period insufficient he requested an extension of leave which was refused. The appellant did not receive the letter refusing the leave but he nevertheless proceeded to take the leave. Subsequently he was asked by the Secretary of the Disciplinary Committee of the University to show cause why disciplinary action should not be taken against him. He replied giving his explanation. He then received a letter stating that the University Council had considered the decision of the Disciplinary Committee and had decided to terminate his employment. The appellant filed a specially indorsed writ for a declaration that the purported dismissal by the respondents was *ultra vires*, illegal and void. He then applied for summary judgment. This application was dismissed by the High Court and he appealed to the Federal Court.

Held: (1) by virtue of section 7(2) and 16A of the University and University Colleges Act, 1971, the disciplinary powers under the Constitution of the University are exercisable only by the Disciplinary Committee and the purported exercise of jurisdiction by the University Council in dismissing the appellant was *ultra vires* its powers;

(2) the appellant as an assistant lecturer appointed by the University, has a status supported by statute and was entitled to the protection of a hearing before the appropriate disciplinary authority, including the right of appeal to the University Council from the decision of that authority. If that right is violated then the court may allow declaratory relief enabling him to retain his employment and continued eligibility to be paid his salary and all emoluments from the date of the purported dismissal;

(3) in an Order 14 case, where it turned on the construction of a few documents and the court was only concerned with what was the true construction, there could be no reason to go formally to trial where no further facts could emerge which would throw light on the documents that had to be construed;

(4) on the view taken by the court as to the construction of the University and University Colleges Act, 1971 and the Constitution of the University, the University had a hopeless case and the application for summary judgment should be granted, as no useful purpose could be served by going formally to trial.

Cases referred to:-

(1) *Attorney-General* v. *Leeds Corporation* [1929] 2 Ch. 291.

(2) *Public Textiles Bhd.* v. *Lembaga Letrik Negara* [1976] 2 M.L.J. 58.

(3) *Ridge* v. *Baldwin* [1963] 2 All E.R. 66.

(4) *Malloch* v. *Aberdeen Corporation* [1971] 2 All E.R. 1278, 1294.

(5) *Harry Tong Lee Hua* v. *Yong Kah Chin* [1981] 2 M.L.J. 1.

(6) *Esso Standard Malaya Bhd.* v. *Southern Cross Airways (M) Bhd.* [1972] 1 M.L.J. 168.

FEDERAL COURT.

Peter Mooney (*Mrs. S.S. Jegathesan* with him) for the appellant.

V. George for the respondent.

Cur. Adv. Vult.

Raja Azlan Shah C.J. (Malaya) (delivering the judgment of the Court): This appeal is against the judgment of the learned judge dismissing an application by the plaintiff (appellant before us) for summary judgment in an action brought by the appellant against the Universiti Teknologi Malaysia (respondents before us) for a declaration that the purported dismissal by the respondents (whom we shall call "the University") of the appellant was *ultra vires*, illegal and void and that the appellant is entitled to be paid his salary and all emoluments as from the date of the purported dismissal.

The appellant was during the material period an Assistant Lecturer employed by the University. He was granted leave for period 21st to 24th June, 1978 for the purpose of participating in the General Election. As he found the period insufficient he sent a telegram requesting for extension of leave which request was refused. Unfortunately, the letter refusing the leave was never received by the appellant but nevertheless he proceeded to go on leave without approval. On July 13, 1978 the Secretary of the Disciplinary Committee wrote a letter to the appellant to show cause in writing why disciplinary action should not be taken against him. On July 25, 1978 he replied giving his explanation. After a period of 8 months the appellant received a letter dated February 13, 1979 stating that the University Council at its meeting held on January 22, 1979 considered the decision of the Disciplinary Committee on the complaint regarding the appellant's absence without leave and the University Council decided to terminate his employment with effect from February 15, 1979. We reproduce excerpts of the said letter:

"Encik Fadzil bin Mohd. Noor, Pusat Pengajian Kemanusiaan, Universiti Teknologi Malaya.

Tuan,

Adalah dimaklumkan Majlis Universiti Teknologi Malaysia telah pun mengadakan satu Mesyuarat Khas pada 22hb. Januari, 1979 bagi menimbangkan perakuan yang dikemukakan